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In the Supreme Court of the United States

OCTOBER TERM, 1979

WALTER METZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by the district court's refusal (a) to sever a co-defendant who purportedly would have given exculpatory testimony for petitioner at a separate trial, and (b) either to compel a second co-defendant to testify over a claim of Fifth Amendment privilege or to admit that co-defendant's prior out-of-court statement.

2. Whether evidence against petitioner was obtained by means of an unconstitutional search.

I

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–22a) is reported at 608 F.2d 147.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1979. A petition for rehearing was denied on February 14, 1980. 618 F.2d 315 (1980) (table). On March 17, 1980, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to April 14, 1980 (Pet. App. 23a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846. He was sentenced to 12 years' imprisonment to be followed by a three-year term of special parole.[1] The court of appeals affirmed (Pet. App. 1a–22a).

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[1] Petitioner has not challenged the validity of his special parole term. However, in light of this Court's recent decision in *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), this aspect of petitioner's sentence was unauthorized and is subject to correction in the district court.

1. The evidence at trial showed that undercover agents of the Drug Enforcement Administration, posing as large-scale narcotics dealers, made arrangements to purchase cocaine from co-defendants Harold Oldham and Paul Hodgson (Tr. 23, 27, 534–537).[2] After extensive negotiations and a small preliminary transaction, an agreement was reached in Dallas on December 11, 1977, for the agents to buy 40 pounds of cocaine in exchange for $850,000. Hodgson stated to the agents that his source in Miami, where the transaction was to occur, sold an average of 100 kilos of cocaine a month and had 60 pounds of cocaine available (Tr. 27–30, 540, 543–545, 677).

The next day, the agents flew to Miami as agreed. They then arranged with Oldham to plan the details of the transaction the following evening. At the appointed time, the agents arrived to meet with Oldham, who was accompanied by co-defendants John Bland and Shirley Ruggiero (Tr. 30, 35–36). Ruggiero offered to sell the agents five pounds of cocaine that she said was at her house, but, when the agents declined, she said that the cocaine would have to be returned to the "stash pad" (Tr. 66, 649–650).

On December 14, 1977, the agents met with co-defendants Oldham, Bland, Ruggiero, and Ronald Schiller, who was introduced to them as the source (Tr. 50–51, 70, 84, 652). Initially, Ruggiero stated that there would be a brief delay in the transaction because they were unable to get into the "stash pad" at that hour of the morning (Tr. 41, 71, 653). A short time

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[2] "Tr." refers to the transcript of petitioner's trial.

later, after inspecting the agents' money, Schiller said that he was going to the "stash pad" to get the 40 pounds of cocaine (Tr. 43, 113–115). Schiller then drove Ruggiero to her residence (Tr. 133–134) and proceeded to petitioner's house (Tr. 122, 134, 136, 142, 446). While Schiller was en route to petitioner's house, the agents called Ruggiero as planned (Tr. 44) and were told that Schiller was on his way to the "stash pad" (Tr. 72, 655). Approximately 30 minutes later (at a time when Schiller was seen entering petitioner's residence (Tr. 727)), the agents again spoke with Ruggiero and were informed that Schiller was at the "stash pad" (Tr. 72, 656). In addition, a green Lincoln Continental (which was not the car driven by Schiller) was observed parked in front of petitioner's house (Tr. 727–728).

Schiller picked up Ruggiero and met the agents at about 4:00 p.m. He brought with him a pound of cocaine and told the agents that, if they were satisfied with it, he would bring another four pounds and complete the deal in five-pound increments (Tr. 76–77). The agents replied that they wanted to purchase the 40 pounds in one lot (Tr. 77). Schiller said that he was not sure that his "connection" would be agreeable but that he would return to the "stash pad" and try to get the entire amount (Tr. 78, 123). Accompanied by Bland, Ruggiero, and Ruggiero's son, co-defendant Willie Ruggiero, Schiller returned to petitioner's residence (Tr. 124, 144, 218–220, 301–302, 757–758, 795), where petitioner met him at the door (Tr. 796, 799). At that time, the green Lincoln Continental was again seen at petitioner's house (Tr. 758).

After further negotiations, the agents agreed to make an initial purchase of one pound of cocaine (Tr. 79–80, 663–664). Schiller then returned to petitioner's residence a third time and stayed for an hour and fifteen minutes (Tr. 223–224, 301, 760, 800). The green Lincoln Continental was still parked in front of petitioner's house (Tr. 760). Thereafter, Bland telephoned the agents to report that Schiller had the five pounds of cocaine. A few hours later, Bland brought the agents a pound of cocaine, which they accepted but said they would withhold payment until they received the additional four pounds (Tr. 79–80, 665–666). Bland then rejoined Schiller and the Ruggieros and placed several telephone calls from a pay phone (Tr. 734–735, 762–764, 801). At 8:30 p.m., as the group was heading back to meet the agents, they were stopped and arrested (Tr. 735, 764–765, 801). Oldham was arrested approximately an hour later (Tr. 361–362).

2. After Schiller, Bland, the Ruggieros, and Oldham were arrested, the agents met at the DEA office to collect and consider the information they had gathered (Tr. 266–267, 394–395, 404–405). They decided to obtain a warrant to search petitioner's residence, and an Assistant United States Attorney was contacted to help prepare the warrant application (Tr. 266, 395). In the meantime, two agents were directed to resume surveillance of petitioner's house pending issuance of the warrant (Tr. 225, 395). At approximately 10:45 p.m., petitioner's wife and a young man were observed to leave the house and drive away. The agents stopped them for brief questioning and also searched their vehicle (Tr. 229–231, 235, 766–767). At this point, the

agents at the DEA office decided that it would be necessary to secure petitioner's house until the search warrant was issued (Tr. 314). An agent told this to petitioner's wife and asked her cooperation in order to minimize the disturbance or physical risk when they entered the house (Tr. 314–315, 356–357). When she proved uncooperative, she was informed that entry to secure the house would be undertaken despite her protests (Tr. 364). Mrs. Metz was then placed in custody to be taken to the DEA office. While en route, she inquired whether other agents would enter the house in her absence and, upon receiving an affirmative reply, stated that she had changed her mind and would admit the agents into the house in order to keep the matter from the attention of the neighbors (Tr. 317–318, 832).

Meanwhile, agents engaged in surveillance at petitioner's house saw petitioner drive off in the green Lincoln Continental shortly after 11:30 p.m. A few minutes later, petitioner returned, parked the car, and went into the house (Tr. 249–252, 768–769).

At approximately midnight, several agents entered petitioner's house (Tr. 366, 368, 769). As they approached the door, the agent in charge of the group took the keys from petitioner's wife (Tr. 319).[3] When he attempted to unlock the door, petitioner's wife shouted, "[i]t's me, and I am with the police. I have the police with me." At that point, the agent opened

[3]The agent refused the request of petitioner's wife that he return the keys, determining that it was necessary for him personally to open the door in order to effect the safest possible entry into the house (Tr. 319-320).

the door and observed petitioner standing in the doorway (Tr. 321). Petitioner's wife then remarked to petitioner, "Hal, are you still here? I thought you would have left by now" (Tr. 835). Petitioner ordered the agents to leave if they did not have a warrant, but they explained to him that they were there to secure the house (Tr. 323–324). Several agents went upstairs to make certain that no one else was present (Tr. 325, 370–371, 841). No search for narcotics was conducted at that time (Tr. 325), but the agents seized a quantity of cocaine approximately the size of a golf ball that was in plain view (Tr. 327, 372, 841).[4] Petitioner and his wife were brought to DEA headquarters at approximately 2:00 a.m. (Tr. 377, 464).

A final copy of the affidavit in support of the application for a search warrant was completed about 2:00 a.m., and a DEA agent and an Assistant United States Attorney brought it to the home of the United States Magistrate at approximately 3:00 a.m. (Tr. 395). The magistrate, after being advised that petitioner's residence had already been secured (Tr. 409), signed the warrant at 3:30 a.m. (Tr. 396, 937) but added a handwritten proviso that it was to be executed only in the daytime (C.A. App. 198).[5] The agents at the house were advised that the warrant had been issued but that a search was not to be undertaken until daylight (Tr. 396, 937). The search was commenced at ap-

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[4]The agent in charge of the group securing the house testified that he also noticed a white powdery substance in plain view on top of the kitchen counter, but since the nature of the substance was not obvious to him, he decided not to make a seizure until the warrant was issued (Tr. 382).

[5]"C.A. App." refers to the appendix in the court of appeals.

proximately 7:00 a.m. (Tr. 397, 858, 937). Traces of cocaine and cocaine residue totalling 2.1 grams were found in the trap in the kitchen sink, on the kitchen counter, in the kitchen garbage can, in the garbage disposal, and in the bathtub drain and on the toilet seat in the upstairs bathroom. In addition, a heat sealer and tracing paper, which are commonly used in packaging cocaine, were discovered in the kitchen. Finally, the agents seized a roll of paper towels that were the same size, color, and design as the paper towel containing the cocaine that Bland had previously given to the agents (Tr. 283–287, 329–330, 846–856, 958–962).

ARGUMENT

1. Petitioner contends (Pet. 10–21) that his rights to a fair trial and to present a defense were violated by the district court's refusal (a) to grant a severance to permit co-defendant Schiller to testify on petitioner's behalf, and (b) either to compel Bland to testify despite his assertion of the privilege against self-incrimination or to admit into evidence Bland's prior out-of-court statement. These contentions are without merit.

a. Petitioner was scheduled to stand trial together with, *inter alia*, his wife and Schiller.[6] After the jury had been selected, and on the day that presentation of evidence was to commence, petitioner and his wife filed a motion under Fed. R. Crim. P. 14 to sever them from the trial so that they could call Schiller as a wit-

[6] Petitioner's wife was subsequently severed from the trial because of illness.

ness (Pet. App. 24a–30a). They alleged that Schiller, if tried first, would testify at their trial that he had been in contact with the other defendants and with the agents regarding an anticipated cocaine transaction, but that petitioner and his wife were neither present nor referred to by him or the others (*id.* at 25a); that, although he visited petitioner's residence three times on December 14, 1977, he did not contact petitioner or his wife on that or the preceding day (*id.* at 26a); and that petitioner and his wife were not knowingly and willfully a part of the conspiracy (*id.* at 26a–27a). They further alleged that Schiller would testify "to the specific circumstances surrounding his visits" to petitioner's residence and to "its ultimate use by him" on December 14, "including the 'how' and 'why' [he] came to be present at different times" at petitioner's residence and "the 'how' and 'why' certain contraband 'ended up' on those premises" (*id.* at 26a). Finally, they referred to Schiller's assurances that he would not testify in his own defense and would invoke his Fifth Amendment privilege if called to testify at a joint trial, but that he would testify for them at a subsequent trial even if his testimony might later be used against him in the event of a successful appeal and ensuing retrial (*id.* at 28a–29a).

The court of appeals correctly held (Pet. App. 15a–16a) that the district court did not abuse its discretion in denying this severance motion (*id.* at 31a–33a). See, *e.g.*, 1 C. Wright, *Federal Practice and Procedure: Criminal* § 225, at 458 (1969).[7] The indictment in this

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[7] A severance rests in the sound discretion of the district judge. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954);

case alleged a complex conspiracy involving 17 defendants. A severance would have required a substantial duplication of effort and thus, as the district court (Pet. App. 32a) and the court of appeals (*id.* at 16a) concluded, would have defeated the objective of judicial economy and efficiency.[8] This difficulty was exacerbated by the fact that petitioner improperly waited to seek a severance until after the trial had commenced (see Fed. R. Crim. P. 12(b)(5)), and his

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Notes of Advisory Committee on Fed. R. Crim. P. 14 ("severance * * * is entirely in the discretion of the court"); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 227, at 468 (1969) (severance of defendants properly joined "is addressed to the discretion of the trial court and a conviction will be reversed only if the refusal of the trial court to grant relief was a clear abuse of discretion"). Moreover, contrary to petitioner's contention (Pet. 15), *Davis* v. *Alaska*, 415 U.S. 308 (1974), does not require de novo appellate review where constitutional rights are asserted to be involved. In *Davis*, the trial court had limited the defendant's cross-examination of a key government witness on the basis of a state statute rather than in the exercise of its discretion. In these circumstances, this Court reversed the conviction on the ground that the statute had been unconstitutionally applied to infringe the defendant's right of confrontation.

[8] Indeed, since defendant Artie Christy had also requested a severance, it is likely that at least three separate trials would have resulted from the defendants' motions to sever.

Petitioner contends (Pet. 14 n.9) that innovative procedures, such as simultaneous but separate juries, could be used to protect the interest of judicial economy. While these innovations might be within the discretion of the district court, it has never been thought that the defendant's right to a fair trial required such novel procedures as a matter of constitutional command. Moreover, we believe that petitioner has overlooked the many problems of implementation and fairness that might arise from these procedures. Cf. *United States* v. *Jackson*, 390 U.S. 570, 579-581 (1968).

explanation for this untimeliness—that he had not expected the district court to deny his pretrial motions to suppress evidence on Fourth Amendment grounds and to exclude co-conspirators' statements as hearsay (*id.* at 28a)—neither excused his dilatoriness nor compelled the district court to exercise its discretion in his favor. See, *e.g.*, *United States* v. *Butler*, 611 F.2d 1066, 1071 (5th Cir. 1980).

Moreover, the courts below correctly determined (Pet. App. 15a, 32a) that Schiller's testimony had not been demonstrated to be sufficiently exculpatory that the denial of the severance would prejudice petitioner's substantial rights.[9] Schiller's proffered testimony was quite general and devoid of supporting facts. Furthermore, much of that testimony was insufficient to cast doubt on petitioner's guilt, since the government's case was not based on petitioner's role in the particular negotiations but rather rested on the use of his residence as the "stash pad." See *United States* v. *Abraham*, 541 F.2d 1234, 1239–1240 (7th Cir. 1976), cert. denied, 429 U.S. 1102 (1977). And with respect to that central issue, petitioner advanced only the vague assertion that Schiller would testify to the "how" and "why" the narcotics "ended up" in petitioner's residence (Pet. App. 26a). Thus, petitioner's motion "'merely hinted at the substance'" (*id.* at 15a) of Schiller's testimony and therefore was properly denied.[10]

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[9]We note that Artie Christy was acquitted at trial notwithstanding that his motion for a severance had been denied.

[10]The courts below also concluded that Schiller's proffered testimony had not been shown to be sufficiently exculpatory because it lacked credibility (Pet. App. 15a, 32a). As the district

b. Petitioner urges (Pet. 18–20) that co-defendant Bland, who had pleaded guilty prior to trial, was erroneously allowed to invoke his privilege against self-incrimination and should have been compelled to testify as a witness for petitioner.

Bland appeared at trial pursuant to a writ of habeas corpus *ad testificandum*. Examined outside the presence of the jury, Bland stated that he would not have appeared voluntarily (Tr. 984). After being advised by the court of his Fifth Amendment privilege not to incriminate himself (Tr. 984–985), Bland inquired whether he could answer some questions but assert the privilege with respect to others. When informed that he could not, Bland stated that he did not wish to take the stand (Tr. 989). He said that he did not know petitioner, that he would have no objection to testifying with respect to petitioner, and that he would not invoke the Fifth Amendment if asked whether he had contacted petitioner on December 14, 1977.[11] However, Bland explained that he would testify only if the questioning were restricted to petitioner and that he wanted neither to hurt the other defendants nor to commit perjury in regard to them (Tr. 991–993). The government also sought testimony from Bland (Tr. 995), and advised the court that as a practical

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court stated, his testimony would " 'cost him nothing. It is not unusual under such circumstances [where caught 'red-handed'], for the obviously guilty defendant to try to assume the entire guilt' " (*id.* at 32a (bracketed material in original), quoting *United States* v. *Alejandro*, 527 F.2d 423, 428 (5th Cir. 1976)).

[11] According to the representation of petitioner's counsel, Bland had said that he was never at petitioner's residence and had not spoken to or conspired with petitioner (Tr. 994).

matter Bland had immunity from further federal prosecution as a result of his guilty plea (Tr. 985–987). At the court's direction, the magistrate appointed an attorney to confer with Bland (Tr. 1050, 1053–1054).[12]

Appointed counsel, after speaking with the prosecutor, concluded that Bland had no federal self-incrimination problems, but advised Bland that he could validly assert his Fifth Amendment privilege because of the possibility of state prosecution (Tr. 1051). The district court agreed that Bland had a valid Fifth Amendment claim and declined to hold him in contempt (Tr. 1058).

The district court correctly sustained Bland's invocation of his Fifth Amendment privilege in light of the possibility of a state prosecution. See, *e.g.*, *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 78–79 (1964). Moreover, contrary to petitioner's suggestion, Bland could not have given testimony favorable to petitioner without waiving this privilege. Once Bland testified that he did not know petitioner and had not been to petitioner's house on December 14, the prosecutor would have been entitled to test Bland's credibility and the significance of his testimony by cross-examining Bland on such matters as his involvement in the conspiracy and the basis and extent of his contact with the other co-conspirators—precisely the areas covered by the Fifth Amendment privilege that Bland was unwilling to waive. Cf. *Brown* v. *United States*, 356 U.S. 148, 154–156 (1958).[13]

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[12] Bland's retained counsel was then in Miami (Tr. 984).

[13] For example, at one point on December 14, 1977, Bland had made a call from a pay telephone to explain that the agents were

Nor is there any merit to petitioner's contention (Pet. 20–21) that the district court erred in excluding from evidence a sworn out-of-court statement that Bland had given to Schiller's counsel. In the statement (C.A. App. 140–163), which consisted of a transcribed question-and-answer session between Bland and the attorney in the attorney's office on August 11, 1978, Bland said that he had never met petitioner prior to their arrests in this case and that he had not been to petitioner's residence on December 14, 1977.

The district court (Tr. 1062–1063) and the court of appeals (Pet. App. 18a) correctly ruled that this statement failed to satisfy the specific provision of Fed. R. Evid. 804(b)(3) that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[14] Bland's statement was given in a nonadversarial setting in response to questions from the lawyer for co-defendant Schiller—circumstances that served to negate rather

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not trying to "rip off" the cocaine when they kept the one-pound package Bland had brought (Tr. 763). Beyond doubt, the prosecutor on cross-examination could explore the circumstances of this conversation, and in particular, the identity of the other party to the call. We also note that the Assistant United States Attorney correctly informed Bland at the trial that he would "be asked about Mr. Schiller and Mrs. Ruggiero" (Tr. 992).

[14]We also do not believe that this statement was contrary to Bland's penal interest since it did not tend to subject him to criminal liability. Of course, if Bland had taken the stand and testified to the same facts, he would have been subject to cross-examination that might have incriminated him (see pages 11–12, *supra*), but the contents of his out-of-court statement, standing alone, were not against Bland's penal interest.

than to corroborate the trustworthiness of the statement. Moreover, the corroboration requirement of Rule 804(b)(3) was especially significant in this case in light of the conflicts between Bland's statement and the evidence given by the government's witnesses at trial. Finally, neither Bland's reiteration of this statement—which was not subject to cross-examination or otherwise shown to be any more reliable than the original statement—nor the testimony of certain of petitioner's alibi witnesses that petitioner was not home on December 14—which was wholly immaterial to Bland's statement that he did not visit petitioner's house on December 14—furnished the requisite corroboration. Accordingly, the district court did not abuse its discretion in excluding Bland's hearsay statement under Fed. R. Evid. 804(b)(3).[15]

2. Petitioner claims that the seizure of cocaine and other items from his house was unlawful because there were neither exigent circumstances justifying the warrantless entry to secure the premises (Pet. 22–26) nor probable cause to justify the subsequent issuance of the search warrant (Pet. 26–27 n.17). These contentions are unavailing.

a. The court of appeals correctly held (Pet. App. 13a) that exigent circumstances justified the warrantless entry into petitioner's house to prevent the destruction of evidence until a warrant could be ob-

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[15] For the same reasons, the statement was also inadmissible under the residual hearsay exception of Fed. R. Evid. 804(b)(5), which requires "equivalent circumstantial guarantees of trustworthiness" to those provided in the specific hearsay exceptions enumerated in Rule 804(b).

tained.[16] Petitioner's confederates had been arrested between 8:30 p.m. and 9:30 p.m. on December 14 while actively engaged in an ongoing narcotics transaction (see page 4, *supra*). Little significant activity was observed at petitioner's residence until approximately 10:30 p.m. (Pet. App. 5a). At that point, petitioner's wife and a young man drove away from the house, and shortly thereafter petitioner also left the house and returned a few minutes later. The decision to seek a warrant had been made and the application for a warrant was being prepared, but unavoidably a few hours would pass before the warrant could be issued. In light of the ease with which narcotics can be concealed, moved, or destroyed, the agents had adequate grounds to secure the premises for the limited purpose of preventing the destruction of evidence pending issuance of a warrant.[17] See *United States* v. *Edwards*, 602 F.2d 458, 468–469 (1st Cir. 1979), and cases cited therein; *United States* v. *Picariello*, 568 F.2d 222, 226 (1st Cir. 1978); *United States* v. *Grummel*, 542 F.2d 789, 791 (9th Cir. 1976), cert. denied, 429 U.S. 1051 (1977); *United States* v. *McLaughlin*, 525 F.2d 517,

[16] That the purpose of the entry was to secure the premises pending issuance of the warrant, and not to conduct a warrantless search, is clearly demonstrated by the fact that no search in fact occurred until a warrant had been obtained. Indeed, while a warrantless plain-view seizure was made of an object that was recognized to be cocaine, no seizure was effected of another item in plain view that, although suspected to be cocaine, was not immediately recognized as such.

[17] In view of the fact that cocaine was found in such places as the kitchen sink, the kitchen garbage can, the garbage disposal, and the bathtub and toilet of the upstairs bathroom (see page 7, *supra*), the agents' concern about possible destruction of evidence proved to be well-founded.

520–521 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976).[18]

Petitioner contends that the agents might justifiably have entered the premises at an earlier time than they actually did and therefore that the warrantless entry was not supported by exigent circumstances. In the end, petitioner simply disagrees with the agents' tactical decision to attempt to minimize the disruption and risk of entering by seeking to gain the cooperation of petitioner's wife.[19] That the agents acted with restraint and caution does not contradict the continued existence of exigent circumstances and affords no basis to invalidate the warrantless entry made while the warrant application was being prepared.[20]

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[18]Contrary to petitioner's contention (Pet. 25-26), the decision below does not conflict with *United States* v. *Robertson*, 606 F.2d 853 (9th Cir. 1979). Unlike the situation in this case, where the purpose of the entry was confined to securing the premises until a warrant could be obtained, the purpose of the entry in *Robertson* was to make an arrest without obtaining a warrant. See 606 F.2d at 856. Moreover, as the *Robertson* court pointed out, the police in that case had the house under surveillance for two hours while awaiting the arrival of the agent who took charge of the entry, and during this period "they may have passed up a reasonable opportunity to have obtained a warrant." *Id.* at 859. Here, on the other hand, the process of obtaining a warrant was underway before and during the time that the residence was entered and secured, and the warrantless entry was not used by the agents in lieu of procuring a warrant.

[19]Petitioner submits, without any citation of support (Pet. 24 n.15), that the agents stopped his wife solely in an effort to substantiate their suspicion that his house was the "stash pad." This assertion is insubstantial. As discussed below, the agents at that point had sufficient information to establish probable cause, and a successful application for a warrant based on that information was already being prepared.

[20]Nor is the existence of exigent circumstances negated, as petitioner contends (Pet. 23), by the fact that the magistrate did

b. Lastly, petitioner briefly contends (Pet. 26–27 n.17) that the agents did not have probable cause to support the issuance of the warrant.[21]

The record amply demonstrates, however, that the agents had probable cause to believe that cocaine was being stored at petitioner's house. On two occasions, they were informed that Schiller was going to the "stash pad," and in both instances Schiller was then observed going to and entering petitioner's house (see page 3, *supra*). Moreover, cocaine was twice delivered to the agents shortly after Schiller had gone to petitioner's residence (pages 3–4, *supra*). Especially in light of Shirley Ruggiero's statements to the agents that the cocaine at her house would have to be returned to the "stash pad" (see page 2, *supra*) and that Schiller was on his way to the stash pad at a time when he had already left her house (*ibid.*), the agents had adequate grounds to conclude that petitioner's residence was serving as the "stash pad."[22] And, notwithstanding petitioner's intimation (Pet. 27 n.17), the

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not authorize nighttime execution of the warrant. Contrary to his assertion (*id.* at n.14), the record shows that the magistrate was informed that the residence had been secured (see page 6, *supra*); in those circumstances, there was no necessity to authorize nighttime execution.

[21] Judge Hatchett, in a one-sentence opinion, dissented in the court of appeals on this issue of probable cause (Pet. App. 22a).

[22] *United States* v. *Taylor*, 599 F.2d 832 (8th Cir. 1979), upon which petitioner relies (Pet. 27 n.17), does not conflict with the decision below. In contrast to the instant case (C.A. App. 199), the application in support of the warrant in *Taylor* was held invalid because it failed to state that the suspects had been seen entering the house that was to be searched (599 F.2d at 836).

prior negotiations for the sale of 40 pounds of cocaine established a sufficient likelihood that additional cocaine (as well as evidence concerning the one pound of cocaine that had already been delivered) would be found at petitioner's house.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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